



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/10482/2014

THE IMMIGRATION ACTS

Heard at Field House
On 5 August 2014

Determination Promulgated
On 8 August 2014

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

MR MIRZAH SHAMAYEL MUSTAFA
(No Anonymity Direction Made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Norman of counsel instructed by Westkin Associates

For the Respondent: Mr T Melvin a Senior Home Office Presenting Officer

DECISION AND DIRECTIONS

1. The appellant is a citizen of Nepal who was born on 18 May 1984. He has been given permission to appeal the determination of First-Tier Tribunal Judge R M M Wallace ("the FTTJ") who dismissed his appeal against the respondent's decision of 14 February 2014 to refuse him leave to remain in the UK as a Tier 1 (Entrepreneur) Migrant under the Points-based System and to remove him by way of directions under section 47 of the Immigration, Asylum and Nationality Act 2006.
2. The appellant entered the UK on 2 February 2008 with leave as a student for a period from 28 January 2008 until 20 September 2009. On 4 June 2010 he was granted leave to

remain as a Tier 4 (General) Student until 4 September 2010. This leave was extended until 31 May 2011. On 18 July 2011 the appellant was granted leave to remain as a Tier 1 Post Study Worker until 18 July 2012. 19 November 2013 the appellant attended an interview relating to his application as a Tier 1 (Entrepreneur) Migrant.

3. The respondent awarded the appellant the required 10 points for English Language, 10 Points for Maintenance Funds but denied him the required 75 points for Attributes. The respondent had “high concerns” regarding the funds which the appellant claimed and whether he was in possession of the £50,000 necessary to invest in his business. He had given contradictory evidence about this. The respondent also considered that there were anomalies relating to the credibility and viability of his business plans and market research. The claimed income in the first years financial forecast was unlikely. He had not signed any new contracts since his application and the contract he had submitted was unclear. Much of the evidence submitted by the appellant was generic and there was no mention of any proper market research. He did not employ any staff and parts of his CV appeared to have been plagiarised from websites. His claimed previous work experience did not appear to assist him in his proposed business.
4. The appellant appealed and the FTTJ heard the appeal on 1 May 2014. Both parties were represented. Oral evidence was given by the appellant who was cross examined. After hearing submissions from both representatives the FTTJ assessed that evidence and gave her decision and reasons in paragraph 36 to 43 of the determination. The appellant had given a convoluted explanation regarding the alleged source of his funds and insisted that he was not relying on third-party funding. His evidence about funding had been inconsistent. There was a lack of clear evidence as to the source of his funding. He had only secured two contracts since making his application. There was little correlation between his former part-time work and the experience he claimed to have. His CV was generic. The FTTJ concluded that the appeal should fail and dismissed it.
5. The appellant applied for and was granted permission to appeal to the Upper Tribunal. The grounds submit that the FTTJ erred in law by misdirecting herself on the issue of the “provenance” of the funds. The third-party requirements only needed to be met if the funds were still in the third-party accounts. The evidence clearly showed that the funds were in the appellant’s personal bank account. The FTTJ had failed to refer to the evidence given at the hearing as to the source of the funds.
6. The respondent has submitted a Rule 24 response in which the primary argument is that the FTTJ directed herself appropriately. However, the response goes on to express “serious concerns” about the FTTJ’s findings, arguing that some of them are inadequate and that there is a lack of clear findings. It is submitted that the FTTJ failed to deal with a number of concerns raised by the respondent in the refusal letter.
7. Mr Melvin submitted that the respondent’s primary position was that there was no material error of law and that the FTTJ made sufficiently clear findings in paragraph 42 of the determination. In this paragraph she did not accept the appellant’s explanations

as to the source of his funds. However, Mr Melvin accepted that the respondent's secondary position was that there was a lack of clear findings of fact and a failure to address the concerns expressed by the respondent in the refusal letter. If I was against him on the primary point but accepted the secondary position he asked me to find errors of law, set aside the decision and remit to the First-Tier Tribunal for rehearing.

8. Ms Norman submitted that there was clear evidence to show that the appellant had the full amount required in his bank account but accepted that there was a lack of clear findings of fact in the determination. If I reached this conclusion she concurred with Mr Melvin that the appeal would have to go back to the First-Tier Tribunal for rehearing with no findings of fact preserved.
9. I find that the FTTJ erred in law. There is confusion as to whether, under the provisions of subparagraphs 245DD (h) (i) and (k) of the Immigration Rules, the FTTJ was considering whether the appellant was attempting to show that the funds were "in his own possession" or "available from the third parties...." The evidence submitted by the appellant appeared to show that the required funds were in his own possession, in his bank account. If this was so then the provenance of the funds and any inconsistencies in the appellant's evidence about this would be more relevant to the question of whether the appellant was making a genuine application. Whilst I accept that paragraphs 36 to 42 of the determination show that the FTTJ had concerns about the appellant's evidence I find that there is no clear and reasoned conclusion. Paragraph 42, which Mr Melvin submits contained such a conclusion, is still balancing the factors for and against the appellant without reaching any clear and reasoned conclusion.
10. I also find that the FTTJ erred in law by failing to reach any clear conclusion as to the credibility of the appellant and what aspects of his evidence should be accepted or rejected. Overall there is a lack of clear findings of fact.
11. No anonymity direction was sought before the First-Tier Tribunal Judge and there has been no application for such a direction to me.
12. Having found that there are errors of law I set aside the decision. There are no findings to be preserved. The appeal should be reheard in the First-Tier Tribunal by a First-Tier Tribunal Judge other than First-Tier Tribunal Judge R M M Wallace. A hearing date has been fixed to take place in Glasgow on 25 August 2014, time estimate one a half hours, one witness and no interpreter required.

Signed:.....
Upper Tribunal Judge Moulden

Date: 5 August 2014